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14 **IN THE UNITED STATES DISTRICT COURT**  
15 **FOR THE DISTRICT OF ARIZONA**

16 State of Arizona, *ex rel.* Kristin K. Mayes,  
17 Attorney General; et al.,

18 Plaintiffs,

19 v.

20 Michael D. Lansky, L.L.C., dba Avid  
21 Telecom; et al.,

22 Defendants.

NO. CV-23-00233-TUC-CKJ

**PLAINTIFFS' OPPOSITION TO  
DEFENDANT LANSKY'S SECOND  
MOTION TO DISMISS  
PLAINTIFFS' ALTER EGO CLAIM  
OF INDIVIDUAL LIABILITY  
AGAINST MICHAEL LANSKY**

23 Plaintiffs respectfully file this opposition to Defendant Michael Lansky's second  
24 motion to dismiss Plaintiffs' alter ego claims. [Dkt 65] For the reasons set forth below,  
25 this Court should deny Defendant Lansky's motion or, at a minimum, deny his request for  
26 a dismissal of claims *with* prejudice.  
27  
28



Further, Defendant Lansky's motion should be denied because he cites no case law or authority to support his motion to dismiss Plaintiffs' alter ego claim. LRCiv 7.2(b) requires moving parties to "set[ ] forth the points and authorities relied upon in support of the motion." *LaCombe v. Bullhead City Hosp. Corp.*, CV 06-2037-PHX-RCB, 2008 WL 216069, at \*6 (D. Ariz. Jan. 23, 2008). Defendant Lansky's motion cites no rules or case law and merely refers to a self-serving reading of this Court's Order. The Court's Order never provided for the relief Defendant Lansky now seeks, nor did it order Plaintiffs to amend their Complaint. In fact, the Order simply contains permissive authorization for Plaintiffs to amend the complaint without the necessity of seeking the Court's approval. Nothing in the Order required Plaintiffs to amend the Complaint. Accordingly, Defendant Lansky's motion should be denied.

**Plaintiffs' Alter Ego Claims Should Not Be Dismissed *with Prejudice***

Even if the Court finds it appropriate to dismiss Plaintiffs' alter ego claim, Plaintiffs oppose Defendant Lansky's motion that it be dismissed *with prejudice*. Defendant Lansky provides no argument or reasoning why this claim should be dismissed with prejudice.

The Ninth Circuit has held that "[c]omplaints may not be dismissed with prejudice unless the allegations of the complaint make clear that plaintiff cannot state a claim." *Orion Tire Corp. v. Goodyear Tire & Rubber Co., Inc.*, 268 F.3d 1133, 1137 (9th Cir. 2001). Where a plaintiff is "able to posit possible amendments that would be consistent with the operative complaint and could also possibly state a claim for relief, the complaint should not be dismissed on its face with prejudice." *Id.* Moreover, with regards to a 12(b)(6) motion, courts in this District have considered new facts when determining "whether to grant leave to amend and whether to dismiss with or without prejudice." *Ranch Realty, Inc. v. DC Ranch Realty, LLC*, 614 F. Supp. 2d 983, 988 (D. Ariz. 2007) (citing *Orion Tire Corp.*, 268 F.3d at 1137 (9th Cir. 2001)).

Defendant Lansky ignores this Court's express order that Plaintiffs may amend their Complaint as permitted by Fed.R.Civ.P. 15(a)(2) and (b). Rule 15(b) instructs courts to "freely permit an amendment when doing so will aid in presenting the merits." "This policy

1 is ‘to be applied with extreme liberality.’” *Eminence Capital, LLC v. Aspeon, Inc.*, 316  
2 F.3d 1048, 1051 (9th Cir. 2003). A court should not deny leave to amend unless “the  
3 amendment: (1) prejudices the opposing party; (2) is sought in bad faith; (3) produces an  
4 undue delay in litigation; or (4) is futile.” *AmerisourceBergen Corp. v. Dialysist W., Inc.*,  
5 465 F.3d 946, 951 (9th Cir. 2006). Defendant Lansky asks this Court to place the cart  
6 before the horse and effectively deny a motion to amend the Complaint that Plaintiffs have  
7 not yet made. Due process requires otherwise.

8 Plaintiffs intend to supplement their prelitigation evidence through discovery.  
9 Plaintiffs have not had the opportunity to conduct discovery on Defendant Lansky to  
10 determine the validity of his assertions that these payments were properly made or  
11 refunded. Prior to the lawsuit, Plaintiffs reviewed certain financial documents pre-litigation  
12 from some—but not all—financial institutions in which Defendants have maintained  
13 accounts. Plaintiffs have not yet had an opportunity, due to the procedural posture of this  
14 case, to obtain further discovery and/or documents from other financial institutions in  
15 which Defendants have maintained accounts to understand the full scope of their  
16 transactions and financial dealings.

17 Plaintiffs have a good faith belief that the evidence, when secured and considered  
18 in its entirety, will show that piercing the corporate veil is appropriate in this case.  
19 However, in order to ensure Plaintiffs meet the pleading threshold underscored by the  
20 Court in its order, the Plaintiffs need additional time to conduct discovery.

21 For instance, in business accounts for Bank of the West and PayPal, there are records  
22 of \$36,000 in personal PayPal payments, thousands of dollars in payments to the City of  
23 Tucson for water, over \$200,000 dollars in checks to the US Treasury and State of Arizona  
24 for Defendant Lansky’s personal taxes, and tens of thousands of dollars to Chrysler.  
25 Additionally, the business credit card for Bank of the West was rarely used—though, for  
26 two months, it was used at a slew of restaurants in the Tucson area.

27 Further, Defendant Lansky claims in his motion that “Avid Telecom’s accounting  
28 records evidence that each of these charges was fully reimbursed by Mr. Lansky

contemporaneously with the receipt of each credit card invoice.” [Dkt 29, n.11]. However, Defendants have not produced these records or documents to Plaintiffs, nor have they produced records showing reimbursement of the thousands of dollars in checks Defendant Lansky sent from a business bank account to pay the City of Tucson for water and the U.S. Treasury for personal taxes.

Plaintiffs intend to seek documents from the other financial institutions to assess Defendants’ business practices.

### Conclusion

Based on the foregoing, this Court should deny Defendant Lansky’s motion, or at a minimum, any dismissal should be without prejudice.

RESPECTFULLY SUBMITTED this 5th day of June, 2024.

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 5, 2024, I caused the foregoing, PLAINTIFFS' OPPOSITION TO DEFENDANT LANSKY'S SECOND MOTION TO DISMISS PLAINTIFFS' ALTER EGO CLAIM to be filed and served electronically via the Court's CM/ECF system upon counsel of record.

/s/ Alyse Meislik

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